93-682

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

MILLARD PROCESSING SERVICES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the National Labor Relations Board and the United States Court of Appeals for the Eighth Circuit have impermissibly allowed labor unions to orchestrate coercive videotaping of employees engaged in protected activity on the eve of a representation election thereby destroying the necessary "laboratory conditions" for employees to express their free and uninhibited desires.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties filing briefs in the United States Circuit Court of Appeals for the Eighth Circuit were the Petitioners, Millard Processing Services, Inc. The National Labor Relations Board was the Respondent in the lower court action. The United Food and Commercial Workers Union, Local 271 intervened in the proceedings. At the time the case arose, Millard Processing Services, Inc. was a privately-owned Delaware corporation. Subsequently, it has been merged into a privately-owned Nebraska corporation named Millard Refrigerated Services, Inc.

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NATIONAL LABOR RELATIONS BOARD,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Millard Processing Services, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit denying the Petitioner's Petition for Review and enforcing the Order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App., Infra, 1a-15a) is reported at 2 F.3rd 258. The Decision and Certification of Representative of the National Labor Relations Board (App., Infra,

16a-25a) is reported at 304 NLRB 770. The Hearing Officer's Report and Recommendations on Objections (App., Infra, 26a-62a) is contained herein but was not reported by the Board.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered on July 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and under Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e).

STATEMENT

This case raises a recurring and exceptionally important issue of federal labor law concerning a union's or an employer's ability to orchestrate surveillance in the form of videotaping or photographing of employees on the eve of a representation election to inhibit employees' true desires. The Eighth Circuit's decision allowing union surrogates to accomplish that which they cannot should be reviewed by the Court to assure that employees are guaranteed the right to a free and fair election.

1. The Election.

The Petitioner, Millard Processing Services, Inc. (hereinafter "MPS" or "Employer") operates a bacon processing facility in Omaha, Nebraska. The United Food and Commercial Workers Union, Local 271 ("UFCW" or

"Union") petitioned the National Labor Relations Board to represent certain of the Petitioner's employees.[1] A representation election was held on June 29, 1990 wherein the UFCW apparently prevailed by a vote of 114 to 84, with 10 challenged ballots. MPS filed objections to the election alleging that the Union had engaged in misconduct which materially affected the election results. Specifically, MPS alleged that, on the eve of the election, the Union and its agents or representatives videotaped employees as they passed by union agents passing out literature urging employees to vote for the Union. MPS also alleged that employees who were being videotaped engaged in protected activity, i.e. either accepting or declining union literature. MPS further alleged that the employees' cars were being filmed while leaving the employer's parking lot, thus further intimidating employees.

2. Decision of the Hearing Officer.

The Board's Hearing Officer found that a cameraman had been solicited and driven by the UFCW to the MPS facility to film employees during the shift change. The cameraman, who was neither an MPS nor UFCW employee, filmed from an area where the Union had traditionally done its campaigning and pamphleteering.

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[1] The unit is: All full-time and regular part-time maintenance, production and sanitation employees employed by Millard Processing Services, Inc. at its facility located at 13076 Renfro Circle, Omaha, Nebraska, but excluding all office clerical employees, guards, foremen and supervisors as defined in the Act and all other employees.

He filmed from in front of a UFCW banner and wore a "Union Yes" hat, distributed by the Union organizers. His camera bore no markings identifying him and he wore no other identification. The camera was borrowed from one of the Union organizers through another organization. During the entire time that the cameraman remained on the premises, two union organizers including the UFCW's General Organizer remained on the scene. The Hearing Officer found that approximately 250-275 employees may have passed by the site during the filming. The cameraman revealed his identity only to those three individuals who asked. Each worker from whom the cameraman requested a taped interview refused the invitation. The Board's Hearing Officer issued a Report and Recommendations on Objections (App., Infra, 26a-62a) wherein she partially sustained the Employer's Objections based upon the Union's election eve videotaping of employees and directed that a second election be conducted.

3. Decision of the National Labor Relations Board.

The Union filed Exceptions to the Hearing Officer's Report and Recommendations to the Board. On August 27, 1991, the Board entered its Order, reported at 304 NLRB No. 99 (1991), which certified UFCW, Local 271 as the exclusive collective bargaining representative of the MPS' employees. The Board reasoned that the videotaping was not coercive because, perhaps, 20 of 250-275 unit employees may have been told the cameraman's identity and the reason for the filming (App., Infra, 19a). The Board also found that the cameraman was neither an "actual" nor "apparent" agent of the Union (App., Infra,

21a-22a). Since there was no evidence establishing a pervasive atmosphere of fear and reprisal, the Union was certified as the exclusive representative of the employees (App., Infra, 22a-23a).

4. Decision of the Eighth Circuit Court of Appeals.

On a Petition for Review and Cross-Application for Enforcement, the United States Court of Appeals for the Eighth Circuit held that the employer must show, by specific evidence, not only that campaign improprieties occurred, but also that they interfered with the employees' exercise of free choice and materially affected the election results (App., Infra, 7a-8a). The Court accorded less weight to the cameraman's misconduct reasoning that his actions were not attributable to the Union (App., Infra, 12a). In spite of the fact that the Union asked the cameraman to attend the election eve rally, the time that his filming would be most effective, drove him to the rally, gave him a union hat to wear and positioned him among union organizers, the lower court held that the UFCW had no duty to disavow his actions as the cameraman was not clothed with "apparent authority" to act on behalf of the Union (App., Infra, 11a-12a).

Because the cameraman's activities were not attributable to the Union, MPS was required to show that his conduct created an atmosphere of fear and reprisal so as to render the employee's free expression of choice impossible (App., Infra, 12a-14a). The Eighth Circuit also held that the Union had offered a legitimate explanation for the videotaping because it may have informed as many as 20 employees out of a unit of 250-275 employees that the

cameraman was filming for a cable television station (App., Infra, 13a). Finally, the Court reasoned that because the election results were not close, the videotaping did not create an atmosphere of fear and reprisal sufficient to warrant setting aside the election (App., Infra, 14a).

The Honorable Judge Floyd R. Gibson dissented and held that the videotaping was intimidating and coercive and would reasonably interfere with the employees' free choice because the cameraman wore a "Union Yes" hat in close proximity to the union's banner, he created the impression that he was a union representative (App., Infra, 15a). Moreover, the cameraman's failure to wear any identification which connected him to the television station and to employees leaving the plant, he appeared to be a union representative filming employees accepting or declining union literature. The dissenting judge also held that the Union had orchestrated the event by contacting him and arranging for the filming during a shift change on the eve of the election and that the filming of the employees and their vehicles by an individual who appeared to be a union representative created a coercive atmosphere which interfered with the employees' exercise of their free choice (App., Infra, 15a).

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED IS A REOCCURRING QUESTION OF EXCEPTIONAL PUBLIC IMPORTANCE.

A. Representation Elections Must Be Held As Closely As Possible Under "Laboratory" Conditions.

A paramount purpose of the National Labor Relations Act ("Act") is to protect "the right of employees to

organize and bargain collectively". 29 U.S.C. § 151 (1982). This purpose is best served when employees are allowed to exercise their rights to an election uninhibited by coercive conduct by either the employer, the union or third parties. "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees". *General Shoe Corp.*, 77 NLRB 124, 127 (1948). The existence of a coercive atmosphere, regardless of how such an atmosphere was created, destroys these necessary "laboratory conditions".

B. Photographing Or Videotaping Employees Engaged in Protected Activity Is Inherently Inhibiting.

The federal courts have held that surveillance is inherently inhibiting. *See Belcher Towing Co. v. NLRB*, 726 F.2d 705, 707 (11th Cir. 1984); *NLRB v. Computed Time Corp.*, 587 F.2d 790 (5th Cir. 1979). The Board has also recognized that union videotaping of employees under virtually identical circumstances is unlawful, intimidating and necessitates the direction of another election. In *Pepsi Cola Bottling Company of Los Angeles*, 289 NLRB 736 (1988), the Board held that a union representative's videotaping of only two employees out of a unit of 57 employees at an election eve rally reasonably gave the employees the impression that the pictures would be used for future reprisals against them. Since no legitimate explanation for the videotaping was offered to the employees at the rally, the Board concluded that the conduct was intimidating and would reasonably tend to

interfere with employees' free choice in the election. The Board directed that a second election be directed. Similarly, in *Michael Yurosek & Son, Inc.*, 292 NLRB 1077 (1989), the Board held that a union representative who photographed employees while they were engaged in campaign activities at the front gate to an employer's plant was also engaged in conduct so objectionable as to require the holding of a second election.

In *Nu Skin International, Inc.*, 307 NLRB No. 46 (1992), the Board reconsidered its *Pepsi Cola* and *Michael Yurosek & Son, Inc.* decisions; clarifying their holdings. In *Nu Skin International, Inc., supra,* union representatives took approximately 88 photographs of employees who had voluntarily attended the union's picnic luncheon. In many of the photographs, employees posed for the camera, sometimes displaying their union t-shirts. The employer objected to the election results based on this event. The Board appropriately found the photographs to be innocuous, non-coercive and not such that they would reasonably tend to interfere with the employee's free and uncoerced choice in the election.

But in restating the standards set forth in *Pepsi Cola* and *Michael Yurosek & Son, Inc.*, the Board declared:

> "Thus, in both *Pepsi Cola* and *Michael Yurosek & Son, Inc.*, employees at the plant entrance in the presence of union campaign activity, were photographed or videotaped by the union. Under the circumstances, the employees might well have felt that their responses to the union campaign activity were being recorded for the purpose of future retaliation."

Obviously, then, the videotaping in this case was inherently intimidating and destroys the requisite "laboratory conditions" for a representation election.

Review of the Eighth Circuit's decision is necessary to assure that employees' rights to free and fair elections are not subverted by decisions which permit parties to use surrogates to coerce employees in the exercise of their protected rights.

II. THE COURT OF APPEALS' DECISION IS PLAINLY IN ERROR AND SHOULD BE REVERSED.

The lower court's enforcement of the Board's Order on the grounds that the cameraman was not an agent of the union misapplied the standards for determining whether conduct is attributable to a party. Common-law agency concepts are to be employed to determine whether conduct is attributable to a party. *See NLRB v. Georgetown Dress Co.*, 537 F.2d 1239 (4th Cir. 1976). Moreover, common-law agency concepts are to be construed liberally to effectuate the purposes of the Act. *See International Association of Machinists, Lodge No. 35 v. NLRB*, 311 U.S. 72 (1940).[2]

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[2] *See also, NLRB v. Service American Corp.*, 841 F.2d 191, 196 (7th Cir. 1988); *NLRB v. Katz*, 701 F.2d 703 (7th Cir. 1983); *NLRB v. L&J Equipment Co., Inc.*, 745 F.2d 224, 232-34, *reh'g denied*, 750 F.2d 25 (3rd Cir. 1984); *NLRB v. Georgetown Dress Co.*, 537 F.2d 1239, 1244 (4th Cir. 1976); *NLRB v. Tampa Crown Distributors, Inc.*, 272 F.2d 470 (5th Cir. 1959); *St. Elizabeth Hospital v. NLRB*, 715 F.2d 1193 (7th Cir. 1983); *NLRB v. Urban Telephone Corp.*, 499 F.2d 239 (7th Cir. 1974); *NLRB v. Advanced Systems, Inc.*, 681 F.2d

In fact, 29 U.S.C. § 152(13) instructs that "[i]n determining whether any persons acting as a single "agent" of another person so as to make another person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling". *See Service Employees, Local 87 (West Bay)*, 291 NLRB 82 (1988). This language was intended by Congress to incorporate the general common-law of agency into the field of labor law. *Local 1814, International Longshoreman's Association v. NLRB*, 735 F.2d 1384, 1393-94 (D.C. Cir.), *cert denied*, 469 U.S. 1072 (1984); *Metco Product, Inc. v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989).

The Eighth Circuit ignored its statutory mandate to construe agency principles expansively in order to protect the necessary "laboratory conditions" under which elections are to be held. The lower court failed to appropriately consider the importance of the MPS employees' reasonable belief as to whether the cameraman was authorized to act on the Union's behalf. *See NLRB v. L&J Equipment Co.*, 745 F.2d 224, *reh'g denied*, 750 F.2d 25 (3rd Cir. 1984). The failure of the court to adequately consider the reasonable beliefs of the employees is contrary to the statutory mandate that agency principles be expansively construed. Moreover, not only did the court fail to consider the effect of the conduct on third parties, but it enforced a Board decision that reflects a double-standard in union management relations. In analogous situations, the Board has held that "apparent authority" may be

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570 (9th Cir. 1982); *Dowd v. ILA*, 975 F.2d 779, 782 (11th Cir. 1992).

inferred when an employer acts with the cooperation of or in the presence of supervisors. *See Advanced Mining Group*, 268 NLRB 468, 503-504 (1982); *W. M. Chalson & Co.*, 253 NLRB 25 (1980); *Hit 'N Run Food Stores*, 231 NLRB 660, 668-669 (1977). Analogously, where the third party acts completely in the presence of union officials, "apparent authority" may be inferred by the union's failure to disavow his action. *See Haynes Industries*, 232 NLRB 1092, 1099-1100 (1977). Here, there was absolutely no disavowal or explanation of the conduct of the cameraman by the Union and, thus, "apparent authority" should be inferred.

The policy implications of the lower court's approach are troubling. It does not require unions or employers to disavow actions or statements made by their supporters even though their actions or statements may have had an improper influence on other employees. *See NLRB v. L&J Equipment Co.*, 745 F.2d 224, *reh'g denied*, 750 F.2d 25 (3rd Cir. 1984). The court's technical adherence to narrow agency principles may also encourage parties to a representation election to use surrogates, to intimidate employees into voting a particular way.

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH NUMEROUS DECISIONS REGARDING INVALIDATION OF REPRESENTATION ELECTIONS.

The Eighth Circuit held that because the conduct was not attributable to the Union, it would require evidence showing that an atmosphere of "fear and coercion" existed before it would overturn the results of the election

(App., Infra, 12a-14a). The court reasoned that a legitimate explanation was offered by the Union to about twenty employees (approximately 8% of the unit). Further, there was no evidence of violence or threats establishing a coercive atmosphere and therefore no employee-wide explanation was necessary (App. Infra, 13a-14a). Yet, there was no plausible explanation given. The cameraman thought he would get some interviews and get the information out to his community. Yet, the tape was never aired or viewed by the Union and the cameraman taped over the videotape. He got no interviews in 1½ hours. Every employee he asked for an interview declined. Moreover, the entire bargaining unit was subjected to the videotaping. The court's decision places the burden on employees to ask the identity of the cameraman. Yet, why should the burden be on employees to ask why their activities are being monitored?

Other circuits do not necessarily require an atmosphere of "fear and coercion" before they will invalidate an election for the actions of a third party. "Acts not attributable to a party require election invalidation if they destroy the atmosphere necessary to the exercise of a free choice in the representation election". *M&M Supermarkets, Inc. v. NLRB*, 818 F.2d 1567 (11th Cir. 1987); *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26 (5th Cir. 1979); *DID Building Service v. NLRB*, 915 F.2d 490 (9th Cir. 1990).

Additionally, the Board, with the approval of other circuits, have held that union elections may be set aside based upon media interference. *See Universal Manufacturing Corp.*, 156 NLRB 1459 (1966); *Hedstrom Co., Subdivision of Brown Group*, 223 NLRB 1409 (1976), *enf'd in pertinent part and remanded*, 558 F.2d 1137 (3rd Cir.), *aff'd*, 235 NLRB

1193 (1978), *enf'd*, 629 F.2d 305 (3rd Cir.), *cert denied*, 450 U.S. 996 (1981). Thus, even if the cameraman is not an agent of either party, the election still should have been set aside due to the cameraman's creation of an atmosphere of confusion surrounding the reasons for his videotaping.

This Court should grant review of the decision below and hold that neither a union nor an employer may subvert the free will of employees by engaging third parties to monitor the protected activities of employees on the eve of a representation election which has the natural effect of inhibiting the free expression of their electoral desires.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MILLARD PROCESSING SERVICES, INC.

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FOR THE EIGHTH CIRCUIT

No. 92-3474

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Respondent,
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No. 92-3631

Millard Processing Services, Inc.,
Respondent,
v.
National Labor Relations Board,
Petitioner,
United Food and Commercial Workers, Union Local 271 AFL-CIO,
Intervenor.

Petitions for Review of Orders of the National Labor Relations Board.

JUDGMENT

This cause was submitted on the petition for review of an order of the National Labor Relations Board, administrative record, appendix, briefs of the parties and was argued by counsel.

After consideration, it is hereby adjudged and decreed that the order of the National Labor Relations Board is enforced and that the petitioner abide by and perform the directions in said order in accordance with the opinion of this Court.

July 30, 1993

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

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National Labor Relations Board,

Petitioner,

United Food and Commercial Workers, Union Local 271 AFL-CIO,

Intervenor.

Petitions for Review of Orders of the National Labor Relations Board.

Submitted: April 14, 1993

Filed: July 30, 1993

Before WOLLMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

WOLLMAN, Circuit Judge.

Millard Processing Services ("Millard") petitions for review of a decision and order of the National Labor Relations Board; the Board cross-applies for enforcement of its order. We affirm the Board's decision and enforce its order.

I.

Millard operates a bacon-processing facility in Omaha, Nebraska. Millard employs approximately 275 people, who are divided evenly between two shifts. The first shift ends at 4:30 p.m. and the second shift begins at 5:00 p.m.

Local 271 of the United Food and Commercial Workers Union (the "union") filed a petition to represent Millard's production and maintenance employees. In an attempt to obtain media coverage of the representation election, Patrick O'Neil, the head union coordinator, contacted four Omaha television stations, leaving messages concerning the union campaign and the election. Additionally, O'Neil told Felipe Morales, a union representative, to inform Fernando Castillo about the campaign and election. Castillo, the assistant director of the Information

and Service Network ("ISN"), a local production company that produces programming for a cable television station, had previously asked Morales to keep him apprised of any campaign events. Morales telephoned Castillo and informed him that the union was planning to hold a rally outside Millard's plant on June 28, 1990, the day before the election. Castillo told Morales that he would like to visit the Millard plant and interview employees about the election. Morales advised Castillo that the best time to contact employees would be during the shift change.

On June 28, Castillo went to the Millard facility with Morales, arriving at about 3:30 p.m. Castillo set his video camera on a tripod some twenty feet from where O'Neil and other union representatives were distributing leaflets in front of a union banner. Castillo's camera did not bear any identifying insignia, and he was not wearing anything that associated him with ISN. When Millard employees asked O'Neil about Castillo's identity, O'Neil explained that Castillo worked for a cable television station.

Castillo stayed at the Millard facility for about one and one-half hours. As background footage for his anticipated employee interviews, Castillo filmed the plant, employees entering and exiting the plant, and vehicles entering and exiting the plant parking lot. He also filmed employees as they accepted or declined the material being distributed by the union representatives. Castillo approached two or three employees, identified himself as being from ISN, and asked them what they thought about the union election. All employees that he approached declined to comment, however. Castillo also identified

himself to those employees who asked why he was filming. Castillo did not distribute any union material or otherwise campaign for the union while he was at the Millard facility. He did, however, don one of the "Union, Yes" hats that union representatives were distributing.

The election was held the following day, June 29. Of the approximately 240 employees eligible to vote, 114 voted for union representation, and eighty-four voted against it, with ten challenged ballots.

Millard filed objections to the election, alleging, *inter alia*, that the union, through its representatives and agents, had created the impression of intimidating surveillance by using a video camera in front of employees. It contended that by videotaping employees and their automobiles as they declined union pamphlets, the union had intimidated employees, interfered with their free choice, and made a free and fair election impossible.

A Board hearing officer conducted a hearing to consider Millard's objections. Applying the doctrine of apparent authority, the hearing officer found that Castillo had acted as an agent of the union at the time that he videotaped employees. The hearing officer further found that videotaping employees was intimidating and coercive and would reasonably tend to interfere with employee free choice in an election. Accordingly, the hearing officer recommended that Millard's objections concerning Castillo's videotaping be sustained and that the election be set aside.

The Board rejected the hearing officer's findings and recommendations, finding that Castillo's videotaping of employees did not warrant setting aside the election.

Millard Processing Services, Inc., 304 N.L.R.B. No. 99 (August 27, 1991). The Board found that Castillo had not acted as an agent of the union while videotaping employees. The Board also found that Castillo's videotaping was not objectionable conduct under the Board's standard for assessing third-party conduct during election campaigns. Accordingly, the Board certified the union as the exclusive collective bargaining representative of Millard's employees.

In order to challenge the Board's certification of the union, Millard refused to recognize and bargain with the union and to provide the union with information that it had requested. The Board found that by engaging in such conduct Millard had committed unfair labor practices in violation of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the "Act"). *Millard Processing Services, Inc.*, 308 N.L.R.B. No. 138 (September 22, 1992). The Board issued an order requiring Millard to bargain with the union, to furnish the union with the requested information, and to post an appropriate notice to employees.

Millard petitions for review of the Board's order; the Board cross-applies for enforcement of its order. Additionally, the union intervenes in support of the Board's order.

II.

Representation elections are not to be set aside lightly. *Beaird-Poulan Div. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981). The party challenging an election carries a heavy burden: the objecting party must "show by specific evidence not only that improprieties occurred, but also

that they interfered with employees' exercise of free choice to such an extent that they materially affected the election results." *Id.* In reviewing the Board's decision concerning whether to set aside an election, the standard is whether "the Board acted within the 'wide degree of discretion' vested in it by Congress regarding representation matters." *Id.* (quoting *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946)).

In some circumstances, the Board has set aside elections in which employees were videotaped or photographed during the election campaign; in other circumstances, however, the Board has refused to do so. For example, in *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. 736 (1988), the Board overturned an election where, on the day before the election, a union representative videotaped employees as they exited the employer's premises and were offered union leaflets. In *Mike Yurosek & Son, Inc.*, 292 N.L.R.B. 1074 (1989), the Board set aside an election where, on virtually every day of the campaign, a union agent had photographed prounion and antiunion employees engaging in campaign activity at the employer's entrance gate. On the other hand, in *Nu Skin Int'l, Inc.*, 307 N.L.R.B. No. 46 (April 22, 1992), the Board refused to overturn an election where a union representative had photographed employees at a union-sponsored picnic on the day before the election. In both *Pepsi-Cola* and *Mike Yurosek*, the individual who engaged in the misconduct was a union representative or agent. When misconduct is directly attributable to the union, the Board will overturn the election when the "conduct reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Pepsi-Cola*, 289 N.L.R.B. at

736. Less weight is accorded to third-party misconduct, however, than to union (or management) misconduct. *Monark Boat Co.*, 713 F.2d 355, 360 (8th Cir. 1983); *Beaird-Poulan*, 649 F.2d at 594 (citing *NLRB v. Griffith Oldsmobile, Inc.*, 455 F.2d 867, 870 (8th Cir. 1972)). When misconduct is attributable to a third party, the election will be overturned only if the conduct created " 'an atmosphere of fear and reprisal such as to render a free expression of choice impossible.' " *Monark Boat*, 713 F.2d at 360 (quoting *Griffith Oldsmobile*, 455 F.2d at 870). Accordingly, the first inquiry in this case is whether Castillo was acting as an agent of the union when he videotaped Millard employees.

In rejecting the hearing officer's findings, the Board found that the absence of any identification connecting Castillo to ISN, his wearing a hat promoting unions, and his relatively close proximity to the union organizers and the union banner were insufficient to establish that Castillo had apparent authority to act on behalf of the union. The Board concluded that Millard had failed to show that the union had acted in a manner to cause reasonable employees to believe that Castillo was its agent.

"We will enforce an order of the Board if the Board has correctly applied the law and its factual findings are supported by substantial evidence on the record considered as a whole, even though we might have reached a different decision had the matter been before us *de novo*." *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1507 (8th Cir. 1993) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). We apply the substantial evidence standard even in those cases in which the Board, as it did here, reverses the decision of the hearing officer. *GSX Corp. v.*

NLRB, 918 F.2d 1351, 1356 (8th Cir. 1990) (citing *Paintsmiths, Inc. v. NLRB*, 620 F.2d 1326, 1329 (8th Cir. 1980)). Nonetheless, because the hearing officer's factual findings are part of the record against which the substantiality of the evidence must be measured, we will review the Board's contrary findings more critically in those cases. *Id.* (citing *Colson Equip., Inc. v. NLRB*, 673 F.2d 221, 223 (8th Cir. 1982)).

In determining whether an individual was acting as an agent of a union for the purposes of the Act, we apply general common law principles of agency. *NLRB v. International Bhd. of Boilermakers Local 83*, 321 F.2d 807, 810 (8th Cir. 1963); *Alliance Rubber Co.*, 286 N.L.R.B. 645, 645 (1987). Whether an individual was a union agent is a question of fact. *Boilermakers Local 83*, 321 F.2d at 810. The party asserting the agency relationship bears the burden of establishing its existence. *Sunset Line & Twine Co.*, 79 N.L.R.B. 1487, 1508 (1948) (citing *Gosney v. Metropolitan Life Ins. Co.*, 114 F.2d 649, 653 (8th Cir. 1940)).

Apparent authority results from a manifestation by a principal to a third party that reasonably leads a third party to believe that another person is acting as the principal's agent. *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138, 141 (9th Cir.) (citing *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 756 (9th Cir. 1969)), *cert. denied*, 429 U.S. 895 (1976); *Restatement (Second) of Agency* §§ 8, 27 (1958). The manifestations may consist of direct statements to the third party or of the granting of permission to the other person to do something which reasonably leads the third party to believe that that person has the authority to perform those acts. *Id.* To create apparent authority, the principal must either intend to

cause the third party to believe that the agent is authorized to act for it, or should realize that its conduct is likely to create such a belief. *Restatement (Second) of Agency* § 27 cmt. a (1958). Only information actually communicated to and known by a third party can establish apparent authority. *Id.* § 27 cmt. b.

In arguing that Castillo was the apparent agent of the union, Millard points out that the union informed Castillo about the rally, told him when he could film the most employees, and drove him to the Millard facility. As the Board found, however, these facts are irrelevant to establishing apparent authority because there is no record evidence that any employees were aware that the union had done these things.

Millard also points out that Castillo, who wore no identification connecting him to ISN, placed his camera near the union organizers and a union banner and wore a union hat while filming employees. Additionally, Millard stresses that the union did not affirmatively disavow Castillo's actions to all employees; rather, the union explained Castillo's identity only to those employees who asked about him. Millard argues that under these facts the union knew or should have known that when employees observed Castillo filming at the plant they would reasonably believe that he was acting on the union's behalf.

We affirm the Board's finding that Castillo's conduct in wearing a hat with a generalized prounion statement and in filming in close proximity to the union organizers and banner did not establish his apparent authority to act on the union's behalf. We have recognized that even

engaging in union campaign activity (which Castillo did not do) is insufficient by itself to clothe a person with apparent authority to act on behalf of the union. *See Beaird-Poulan*, 649 F.2d at 594 (citing *Certain-Teed Prods. Corp. v. NLRB*, 562 F.2d 500, 509-10 (7th Cir. 1977)). We note that when employees asked union organizer O'Neil about the cameraman's identity, O'Neil indicated that Castillo worked for a local cable television station. Likewise, Castillo identified himself as being from ISN to every employee whom he attempted to interview or who asked why he was filming. In short, we conclude that Castillo's presence and conduct at the scene did not constitute manifestations by the union sufficient to declare to third parties that Castillo was the union's agent.

We next consider whether Castillo's conduct was such that it requires that the election be set aside. As stated earlier, when alleged misconduct is attributable to a third party, the test is whether the conduct created " 'an atmosphere of fear and reprisal such as to render a free expression of choice impossible.' " *Monark Boat*, 713 F.2d at 360 (quoting *Griffith Oldsmobile*, 455 F.2d at 870).

In arguing that Castillo's videotaping created a coercive environment, Millard emphasizes that Castillo filmed employees as they declined union literature. Millard also stresses that the videotaping occurred on the eve of the election during the shift change when a large number of employees may have seen or been subjected to the filming. Citing *Pepsi-Cola* and *Mike Yurosek*, Millard argues that under these circumstances, a significant number of employees might have felt that their responses to the union campaign activity were being recorded for the purpose of future union retaliation.

This case is distinguishable from *Pepsi-Cola* and *Mike Yurosek* on several grounds. As we have already discussed, both of those cases involved the conduct of a union agent and not, as here, the conduct of a third party.

Moreover, in determining whether the filming of employees created a coercive atmosphere, the Board examines whether a legitimate explanation for the filming has been presented. In *Pepsi-Cola,* the Board emphasized that the union had not provided a legitimate explanation for the videotaping to the employees at the time of the filming or at the hearing. 289 N.L.R.B. at 737. Likewise, in *Mike Yurosek,* the Board again noted that the union had not offered a valid explanation for photographing employees engaged in antiunion activity. Indeed, the union agent who took the photographs had told an antiunion employee that "We've got it on film; we know who you guys are . . . after the Union wins the election some of you may not be here." 292 N.L.R.B. at 1074. On the other hand, in *Nu Skin Int'l,* the Board distinguished *Pepsi-Cola* and *Mike Yurosek* and declined to set aside an election in view of the fact that the union had provided a legitimate explanation for the photographing. 307 N.L.R.B. No. 46, slip op. at 2-3.

In the present case the union offered a legitimate explanation for the videotaping. The hearing officer and the Board both found that O'Neil and Castillo had informed some twenty employees that Castillo was filming for a cable television station. True, the union and Castillo did not explain Castillo's identity to all of the employees who either were filmed by Castillo or who observed him filming. Nevertheless, where the person videotaping was not a party to the election and where the

record contains no evidence of violence or threats or any other facts establishing a coercive atmosphere during the election campaign, we are unwilling to find that the absence of an employee-wide explanation requires overturning the election. *Cf. Sunbelt Mfg., Inc.*, 308 N.L.R.B. No. 110 (September 11, 1992) (finding that management's videotaping of employee handbilling had reasonably tended to interfere with and restrain employees in the exercise of section 7 rights where management had not explained the purpose of the filming to the general work force and had unlawfully threatened to close the plant, reduce wages, and discharge a known union supporter).

Finally, conduct during an election campaign must be evaluated in the light of the closeness of the election's outcome. *NLRB v. Van Gorp Corp.*, 615 F.2d 759, 766 (8th Cir. 1980) (citing *NLRB v. Skelly Oil Co.*, 473 F.2d 1079, 1085 (8th Cir. 1973)). In both *Pepsi-Cola* and *Mike Yurosek* the elections were extremely close: twenty-eight votes for union representation and twenty-six against in *Pepsi-Cola*, 289 N.L.R.B. at 736, and 292 votes for and 290 against, with one challenged ballot, in *Mike Yurosek*, 292 N.L.R.B. at 1074. In this case, however, the election was not nearly so close: 114 votes for representation and eighty-four against, with ten challenged ballots. Accordingly, we conclude that the Board did not err in finding that Castillo's videotaping did not create an atmosphere of fear and reprisal, did not render the employees' free choice impossible, and thus did not warrant invalidating the election.

The petition for review is denied, and the Board's order is enforced.

FLOYD R. GIBSON, Senior Circuit Judge, dissenting.

I respectfully dissent and would affirm the hearing officer's recommendation that the election results be set aside. Under the factual situation presented here, the videotaping was intimidating and coercive, and could reasonably interfere with an employees' free choice in the election. Castillo's appearance in a "Union, Yes" hat in close proximity to the union banner created the impression that he was a union representative. Castillo wore no identification that connected him to the ISN station; to an employee leaving the plant, Castillo appeared to be a union representative filming employees accepting or declining union literature. The union orchestrated the event by contacting Castillo and arranging for the filming during a shift change on the eve of the election; the filming of the employees and their vehicles, by an individual who appeared to be a union representative, created a coercive atmosphere that interfered with the employees' exercise of free choice.

If Millard had orchestrated the identical event on the eve of the election, the election would undoubtedly be thrown out and a new election properly ordered. Thus, I respectfully dissent, and would reverse the Board's decision and order a new election.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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Omaha, NE

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILLARD PROCESSING SERVICES, INC
Employer

and

Case 17--RC--10493

DISTRICT UNION LOCAL 271,
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL
UNION, AFL--CIO
Petitioner

DECISION AND CERTIFICATION
OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 29, 1990[1] and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 114 for and 84 against the Petitioner, with 10 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the Petitioner's exceptions and brief and has decided to

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[1] All dates are 1990 unless otherwise stated.

adopt the hearing officer's findings and recommendations only to the extent consistent with this Decision and Certification of Representative.[2]

Contrary to the hearing officer and our dissenting colleague, we do not find that the videotaping of employees during union handbilling outside the Employer's premises on the afternoon before the election warrants setting aside the election. As explained below, we find that the video camera was not being operated by someone whose conduct is attributable to the Union, and we further find that, under the Board's standard for assessing third-party conduct, the videotaping was not objectionable. Accordingly, we reverse the hearing officer and overrule the Employer's Objections 1 and 2.

Patrick O'Neill was the Union's general organizer during the election campaign at the Employer's plant, and he was assisted by Union Representative Felipe Morales, who acted principally as liaison to those in the Employer's work force who were Hispanic. During the course of the campaign, O'Neill telephoned four area television stations, leaving messages regarding the campaign and the election date, and requesting that they contact him. None did. O'Neill also instructed Morales to contact Fernando Castillo, who was responsible for certain television productions broadcast on one of those stations. Specifically, Castillo was an assistant director for the Information and Service Network (ISN), a local cable

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[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule Employer's Objections 3 and 6, the only other objections included within the scope of the instant hearing.

and production company which produces programming targeted at a minority audience and which broadcasts such programming over cable channel 6 during two time periods each week. Neither Castillo nor the Information and Service Network had any commercial relationship with the Union. Castillo had earlier interviewed Morales during the production of a program for a community organization, and had informed Morales that he was interested in taping and gathering information on other events. When Morales called Castillo regarding the election in the instant case, Morales informed him of the date of the election and told him that leafletting would be occurring on the day before the election. Castillo responded that he wanted to be there in order to tape and to attempt to get some interviews. Morales advised Castillo that the time of the shift change was the best time for filming. Morales did not instruct Castillo in any other manner on what or how to tape or whom to interview.

On the afternoon in question Castillo used a borrowed video camera, which he obtained from a community organization, and Morales gave him a ride to and from the site of the Employer's facility. After they arrived, Castillo stationed himself at a corner between the Employer's plant and the employee parking lot near where Morales and O'Neill were distributing campaign flyers. On a fence behind them was a union banner. His equipment consisted of the unmarked video camera and a tripod. At some point, he donned a "Union, Yes" hat, 1 of about 75 such hats handed out during the course of the election campaign. Castillo arrived at the site some time after 3 p.m. and remained until approximately some time

after 5 p.m. The shift change occurred between 4:30 and 5:30 p.m.

As background for the interviews he hoped to get with employees, Castillo videotaped the plant, the employees' parking lot, cars moving along the street, cars entering and leaving the parking lot, and employees entering and leaving the plant, including those who passed the handbilling site who were offered leaflets. He unsuccessfully asked two or three employees for interviews, identifying himself as being with the cable station. He also indicated his purpose and affiliation to a couple of employees who asked him directly why they were being filmed. O'Neill, from where he was leafletting employees, also identified Castillo as being from the cable station in response to inquiries from approximately five employees. Including the employees who were nearby when Castillo's purpose was explained, approximately 20 employees out of a work force of about 250 were made aware of his identity.[3] Because none of the employees agreed to be interviewed, Castillo never used the 15 minutes of footage he taped. Instead, he taped over what he had taken without making any copies.

According to Castillo's uncontroverted testimony, he did not campaign for the Petitioner and received no payment from the Petitioner for the videotaping. He also

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[3] The record does not reveal how many members of the work force were aware of the videotaping. It is possible, therefore, that the 20 employees who were present when Castillo's identity was made clear represented a substantial proportion of those who were aware of the videotaping.

stated that he holds no position with the Union and is not a union member.

The hearing officer found that the actions of the Petitioner and Castillo went beyond merely a newsman filming an event. She noted that Castillo was taken to and from the site by union organizer Morales and that he wore a "Union, Yes" hat while at the site.[4] Further, she recounted that Castillo stood in front of the Petitioner's banner, and that at least two union organizers were present for the entire time. On this basis, the hearing officer found that the Petitioner had not only condoned Castillo's actions but had contributed to them by furnishing him with the "Union, Yes" hat, thus implying that Castillo was a union member. On this basis, she found that it was reasonable for employees to assume that Castillo was another organizer. She then applied the doctrine of apparent authority and found the Petitioner responsible for Castillo's activity even absent evidence that it initiated or authorized his specific actions. Relying on *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988), in which the Board found objectionable a union agent's use of a video camera, she found that Castillo's videotaping was intimidating and would reasonably tend to interfere with employees' exercise of free choice in an election.

In setting out the legal principles for which Castillo's conduct might be considered attributable to the Union,

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[4] Although the hearing officer found that either O'Neill or Morales provided Castillo with the hat, the record merely indicates that Castillo obtained a hat as they were being passed out by an otherwise unidentified person. There is no evidence which would establish that this person was a union organizer.

the hearing officer appropriately described the concept of apparent authority and cited *Dentech Corp.*, 294 NLRB No. 83, slip op. 6-7 (June 12, 1989), in which the Board quoted from *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 82--83 (1988), stating that:

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141, (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Restatement 2d, *Agencys* 27 (1958, Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. Id. at § 8.

Her application of the above concepts to the videotaping in question, however, is flawed for several reasons. The burden of proving any type of agency rests with the party asserting that relationship,[5] i.e., the Employer in the instant case. Under all the circumstances, we do not agree that the absence of markings connecting Castillo to ISN, coupled with a hat bearing union insignia, provides a sufficient basis for finding that Castillo acted on apparent

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[5] *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948).

authority from the Union. The wearing of a hat on which appears a generalized prounion statement and which was widely distributed to employees during the campaign, is not the type of evidence that would significantly tend to establish apparent authority and thereby agency status. To conclude otherwise would mean that anyone who wore an emblem of a party to an election might be deemed an agent of that party. For similar reasons, Castillo's proximity to the union banner and to the admitted Union organizers also does not tend to establish his apparent authority to act as an agent of the Union. As for Morales' driving Castillo to and from the location of the plant, there is no evidence that the employees were aware of that at the time.

Moreover, we note that when the identity of the putative agent was questioned, the principal made clear his separate identity. Thus, both Castillo and O'Neill identified Castillo as being from the cable station or ISN when they were questioned by employees about who he was and his actions. That distinguishes this case from the unusual circumstances in *Pepsi Cola*, supra, in which the individual wielding the camera was a union officer who never offered any explanation to anyone for his videotaping of employees. The Employer, on whom the burden of showing objectionable conduct rests, has not shown that under all the circumstances the Union had acted in a way to cause reasonable employees to believe that Castillo was its agent.

Finally, in assessing Castillo's videotaping under the Board's standard for evaluating third-party conduct, i.e., whether it created a general atmosphere of fear and coercion rendering free choice impossible, we find that his

actions cannot reasonably be expected to have had that result, especially since a legitimate explanation for the videotaping was offered to at least 20 employees who asked about it. Consequently we find that Castillo's videotaping does not warrant invalidating the election and we order that a certification of representative issue.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for District Union Local 271, United Food and Commercial Workers International Union, AFL--CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time maintenance, production, and sanitation employees employed by Millard Processing Services, Inc. at its facility located at 10376 Renfro Circle, Omaha, Nebraska, but EXCLUDING all office clerical employees, guards, foremen and supervisors as defined in the Act, and all other employees.

Dated, Washington, D.C. August 27, 1991

James M. Stephens, Chairman

Mary Miller Cracraft, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER RAUDABAUGH, dissenting.

I dissent. My colleagues in the majority conclude that the Union was not responsible for Castillo's act of videotaping. The evidence shows that a union agent specifically invited Castillo to perform the videotaping, and union agents were standing nearby when Castillo engaged in the videotaping.[1] Thus, the Union specifically approved of, and condoned, the activity in question. In addition, employees would reasonably conclude that Castillo was performing the videotaping at the behest of the Union. During the videotaping, Castillo wore a union hat given to him by the Union. Further, he stood in front of a union banner, and two union organizers stood nearby.

The Union argues that employees would realize that Castillo was acting as an agent for an independent cable television station. However, only about 20 employees in a unit of 240 were made aware of this fact. In addition, neither Castillo nor his equipment had any insignia from the television station. Finally, an employee could reasonably conclude that a camera operator who wore a union hat was not acting on behalf of an independent television station. Indeed, Castillo's wearing of such a hat and his proximity to a union banner and union organizers on

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[1] The majority relies on the fact that both Castillo and O'Neill identified Castillo as being from the cable station. However, as noted, this information was conveyed to only 20 out of 240 unit employees. The majority speculates that only these 20 employees were aware of the videotaping. This speculation is unfounded in light of the fact that the Employer operates two shifts and the videotaping was timed to coincide with shift change, i.e., when all employees were coming to or going from work.

election eve are wholly inconsistent with the expected behavior of an independent journalist.

Accordingly, I conclude that the Union was responsible for the videotaping by Castillo.[2] The next issue is whether such conduct is objectionable. The Board has held that such conduct is objectionable.[3] Through such conduct, the union obtains a graphic and lasting record of who is receptive to the union's appeal and who is not. In such circumstances, the employees reasonably fear that the union will subsequently rely on that record to reward the former and punish the latter. Further, in the instant case, only a few employees were given a legitimate explanation for the videotaping, i.e., that it was being done by a television journalist and not by the Union. Thus, the great majority of the employees could reasonably conclude that the tapes would be available to the Union, as distinguished from being for the sole use of the television station. In these circumstances, there is an unacceptable risk that employees would be intimidated in the exercise of their Section 7 rights.

Dated, Washington, D.C. August 27, 1991

John N. Raudabaugh, Member
NATIONAL LABOR RELATIONS BOARD

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[2] I am not suggesting that a union would be responsible for videotaping by a television station simply because the union invited the station to tape the event. If station personnel tape an event in circumstances which make it clear that they are acting as agents for the station, I would not find union responsibility.

[3] *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988); *Mike Yurosek & Son*, 292 NLRB 1074 (1989).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD SEVENTEENTH REGION

MILLARD PROCESSING SERVICES, INC.

Employer

and Case 17-RC-10493

DISTRICT UNION LOCAL 271,
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION, AFL-CIO

Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

Following the filing of a petition herein on May 8, 1990,[1] and pursuant to a Stipulated Election Agreement approved by the Regional Director on June 4, 1990, an election by secret ballot was conducted on June 29, 1990, among employees in the agreed-upon unit.[2] The tally of ballots, copies of which were made available to the parties at the conclusion of the counting of the ballots on the same day, shows that there were approximately 240 eligible voters, 114 of whom cast ballots for, and 84 cast ballots against representation by the Petitioner. There

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[1] All dates are in 1990 unless otherwise stated.

[2] All full-time and regular part-time maintenance, production, and sanitation employees employed by Millard Processing Services, Inc. at its facility located at 10376 Renfro Circle, Omaha, Nebraska, but EXCLUDING all office clerical employees, guards, foremen and supervisors as defined in the Act, and all other employees.

were no void ballots and 10 challenged ballots. The challenged ballots were not sufficient in number to affect the results of the election.

On July 6, 1990, the Employer timely filed objections to the election, a copy of which was served upon the Petitioner by the Regional Director (Appendix A).

The Regional Director conducted an investigation and, on July 30, 1990, issued and duly served upon the parties an Order Directing Hearing On Objections And Notice of Hearing in which he recommended overruling Employer's Objection 4, but recommended that Objections 1, 2, 3, 5, and 6 raised substantial and material issues of both fact and law which could best be resolved after a hearing. In accordance with that Order and Section 102.69(e) of the Board's Rules and Regulations, a Hearing Officer was designated for the purposes of conducting such hearing and directed to prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the disposition of said objections.

Accordingly, on August 23 and 24, 1990, a hearing was held before Janice C. Clayton, the undersigned hearing officer, duly designated for the purpose of conducting such hearing. The Employer and the Petitioner appeared and participated in the hearing. The Employer and the Petitioner were represented by counsel. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

Upon the entire record in this case, from my observation of the manner and demeanor of the witnesses, and upon due consideration of all the testimony adduced at the hearing, I make the following findings of fact, conclusions of law, and recommendations to the Board.

Background:

The Employer is engaged in the business of manufacturing sliced bacon at its facility located in Omaha, Nebraska. This facility consists of three departments: curing department, slicing department, and maintenance department. The total employee compliment of the facility is approximately 250 to 275 people. The Employer operates two shifts with employees being evenly distributed between these shifts. The first shift normal working hours are from 7:00 a.m. to 4:30 p.m. The second shift is 5:00 p.m. to 2:00 a.m. The curing department starts 30 minutes after the slicing department or 5:30 p.m., but finishes at the same time as the slicing department.

The Employer's facility is located at 13076 Renfro Circle, Omaha, Nebraska. The Employer is housed in an industrial park and occupies the southern part of the building. The Employer also has an employee parking lot which faces 132nd street to the south of the facility. Renfro Circle is at a right angle to 132nd Street and the parking lot. Between the facility and the 132nd Street parking is a building which is not a part of the complex which the Employer occupies. The grounds around this unnamed building are fenced in by a chain link fence. There is an approximately 60-yard sidewalk along Renfro Circle which employees may use to walk to the employee

parking lot. At the corner of Renfro Circle and 132nd Street, employees must cross a four-lane street in order to reach the parking lot. The parking lot is not fenced and employees may enter the lot at any point that they wish by foot. There is one entrance for the use of cars. Immediately at the corner of 132nd and Renfro Circle, the same side of the street as the facility, there is an asphalted area which is rectangular in shape and is 10 feet wide at its broadest point.

The Objections:

The Employer moved to withdraw objection No. 5 immediately upon the opening of the hearing. I recommend that the Board approve the Employer's withdrawal of this objection. The remaining objections, 1, 2, 3, and 6 will be considered seriatim below.

Because Objections Nos. 1 and 2 are so closely related, they will be dealt with jointly.

Objection No. 1

> On or about June 28, 1990, Local 271 of the United Food and Commercial Workers (hereinafter referred to as "UFCW"), acting through its agents and representatives, gathered near the entrance to the Employer's facility and directly across the street from the employees' parking lot and engaged in and created the impression of intimidating surveillance with the use of a video camera in front of employees. The UFCW videotaped employees who refused to accept its leaflets. By this and other conduct, the Union intimidated employees, interfered with the

employees' free choice, and made a free and fair election impossible.

Objection No. 2

On or about June 28, 1990, Local 271 of the United Food and Commercial Workers (hereinafter referred to as "UFCW"), acting through its agents and representatives, gathered near the entrance to the Employer's facility and created the impression of intimidating surveillance with the use of a video camera in front of employees. The UFCW videotaped the automobiles of employees who refused to accept its leaflets. By this and other conduct, the Union intimidated employees, interfered with the employees' free choice, and made a free and fair election impossible.

Counsel for the Employer presented the following employees as witnesses on its behalf: Matthew C. Witt, Kathleen Reddick, Janel Jacob, and Terrie Ann Beam.

Matthew C. Witt, sales coordinator, testified that on June 28, 1990, at approximately 5:00 p.m. when he left the facility in a westward direction on Renfro Circle, he saw a couple of people handing out pamphlets. He also observed a Hispanic man with a video recorder filming employees walking towards their cars and accepting handouts. Although he did not know what the handouts or pamphlets contained, he did see a UFCW banner on the fence behind these individuals. Witt was able to identify one of the individuals handing out leaflets as Patrick O'Neill, who is an Organizer for the Union. As Witt approached the operator of the video camera, the camera was panned over to Witt's car until Witt was even with

the cameraman. According to Witt this all took place during the shift change and approximately six to ten employees were being taped as they headed to the parking lot. He also stated that a few "stragglers" were on their way to the facility. Witt further testified that all employees were being filmed whether they accepted the handout or not from O'Neill. The cameraman stood behind O'Neill at which angle he could film O'Neill and the employees. Witt does not know whether the camera was actually running at this time. Witt stated that the paths of the exiting employees were not blocked.

Kathleen Reddick, unit employee, testified that she left work on June 28, 1990, at 5:15 p.m. and walked along the sidewalk on Renfro Circle to the employees' parking lot on 132nd Street along with another employee. She observed two people at the corner of Renfro Circle. One individual was passing out flyers and the other had a camera. Reddick identified the person who operated the camera as tall with long hair, and the person passing out flyers as short, Mexican, with "bad teeth." Reddick further identified the man behind the camera as between 6'2" and 6'3" and white. According to Reddick, she had seen these two individuals before. Upon further direct examination, Reddick stated that she had not seen these men before. When asked when she saw these individuals passing out literature and operating the cameras, she stated a week before the election. Reddick testified that employees who accepted the handouts were filmed. She also stated that the camera was pointed at her, but she did not accept a flyer. According to Reddick, she always ignored those who distributed leaflets for the Union. Later in direct examination, Reddick stated the incident

involving the camera could have taken place a week before the election and was unsure when it occurred.

Reddick also testified that the cameraman blocked the path as she and another worker attempted to pass, until the other employee pushed the cameraman out of the way. This information was proffered after she was asked if her path had been blocked during cross-examination by the Counsel for the Regional Director. According to Reddick, she did not speak to the Cameraman, nor he to her.

Janel Jacob, unit employee, testified that on June 28, 1990, she left work about 5:15 p.m. and drove out of the parking lot next to the facility. As she drove down Renfro Circle she noticed a man standing on the corner of Renfro Circle and 132nd Street with a video camera. There were also two other individuals standing on the corner. Jacob described the cameraman as pretty tall, about 6'3" with hair longer than shoulder length. According to Jacob the camera was panned on the van as she drove by. She was not sure exactly that part of the van was being videotaped, but stated the camera was aimed more or less towards the front of the van. Jacob had previously walked past this corner, but had never accepted the leaflets which were being passed out. Two employees were walking from the plant to the parking lot as Jacob drove past the camera. She testified that the two employees were not filmed at this time, but the camera was aimed directly at her. Jacob said no one ever attempted to hand her literature as she drove by, and was only offered the leaflets when she was on foot. Jacob is not aware of any of the three individuals attempting to communicate with

her verbally. Jacob did not ask the cameraman why he was taking her picture.

Terrie Ann Beam, unit employee, proffered testimony that on June 28, 1990, she left the facility about 5:15 p.m. and walked to the employee parking lot to ride home with another employee. She was accompanied by Linda Macias. She stated she saw some union representatives passing out union flyers. She believed they were union representatives because they passed out union flyers. She further stated she had seen them there before on several occasions. According to Beam there were five union representatives on the corner. One of these individuals was operating a video camera. The cameraman videotaped individuals as they walked by. Beam stated the camera was pointed directly at her as if she was being filmed. Beam did not accept a leaflet which the individuals passed out, and always turned them down. She stated she believed she was being taped at the time she was offered the leaflet. Beam further testified that there were about half a dozen to a dozen other employees walking who had just got off work. According to Beam all employees who passed were taped. The cameraman stopped taping her after she walked by the person handing out the leaflets. Linda Macias accepted a leaflet and was taped doing so. Upon being cross-examined by Counsel for Petitioner, Beam described the person who videotaped as being tall, about 6'4". She further testified that she could not tell to which race he belonged because he had the camera up to his face. Beam testified that the camera was black and on a stand. She did not know if she had ever seen this individual before because she did not see his face. After further cross-examination, Beam stated that

she had seen the cameraman before, but she had no idea what was the date. She then stated she had seen the cameraman the day before the election. Further adding to her testimony, Beam next stated that she had seen the individual the other "days that they had been handing out the leaflets, he was out." Beam did not ask the camera operator why he was filming, nor talk to him.

Witnesses presented by the Petitioner were Fernando Castillo, Frank Velasquez, and Patrick O'Neill.

Fernando Castillo testified that he is the assistant director for the Information and Service Network, a local cable and production company. According to Castillo, the Information and Service Network (hereinafter referred to as the Network) is a group of people that produce local programming on the Cox Cable, Channel 6. The Information and Service Network is privately funded and does not derive any revenues from any union or the AFL-CIO. The source of the Network's funding is obtained from production work which is sold to organizations within the community who are involved in human services.

No Union ever buys the Network's products. The program is targeted for the station's minority audience, including the Hispanics.

Castillo further testified that he became acquainted with Felipe Morales, a Union Representative, when Castillo filmed a program for an organization and Morales was being interviewed. Castillo received a telephone call from Morales and was told that the election was going to be held and the Union was going to be handing out leaflets the day before the election. Castillo told Morales that he would like to go down and tape and try to get

some interviews. Castillo chooses his own topics to be filmed without approval of the organization. He also decides which film will be used.

According to Castillo, Morales called because Castillo had already mentioned to him that he was interested in taping and gathering whatever information he could get on what was going on. Castillo testified that he considered the election campaign at the facility to be a newsworthy event for his network, Cable 6, and the audience they served. Morales never asked Castillo to tape, nor did Morales give Castillo instructions, directions how to tape, or what to cover. He also stated that he was not told by either Morales, O'Neill, nor any other union representative what to film. Neither was he asked to film anything in particular. Morales told Castillo that the best time for him to perform his filming was at shift change.

June 28, 1990, Castillo arrived at the corner of Renfro Circle and 132nd Street sometime in the afternoon and believed it may have been around 3:00 p.m. He rode both to and from the site with Morales. He remained at the facility about an hour and a half. Castillo testified that when he arrived, he set up his equipment. He used a two-piece camcorder and a tripod. He placed the camera on the tripod about 20 feet away from where the flyers were being distributed. He stood on the paved area along with Morales and O'Neill.

Castillo testified that he filmed workers going in and out of the plant. He also took some shots of the plant and and [sic] of the parking lot, including cars leaving and entering the parking lot. Castillo also filmed employees as they either accepted or rejected the material being

handed out by the union representatives. In all, Castillo got about 15 minutes of footage of employees. Castillo also testified that while at the site, he did not block employee access to the sidewalk.

Castillo stated that he attempted to get interviews from some of the employees. Castillo testified that he asked a couple of employees whether or not they would like to express their feelings about what was going on or give some information about what was going on as far as the Union and the vote, but as they expressed their unwillingness to do so, no interviews were made. He stopped taping these employees after they declined to give him an interview. Castillo remained about 20 feet away from O'Neill and Morales when he attempted to interview employees. Castillo said he identified himself to the employees he attempted to interview and told them he was from the Information and Service Network and he was taping for something to be put on cable. Castillo only identified himself to the employees whom he attempted to interview. He did not identify himself to other employees who were filmed as they left the facility.

Castillo did not distribute any union material to employees on June 28, 1990, the only day that he was at the Union's distribution site at Renfro Circle and 132nd Street. He further stated that he did not engage in any campaigning for the Union.

According to Castillo the film was taped over and was never used. The purpose of the taping was to get interviews with employees and get their feelings on what was going on, but since he did not get interviews, the film was never used. No copy of the film was ever made,

nor did the Union ever view the film. Castillo did not receive any kind of payment from the Union or any of the union representatives for filming on June 28. Castillo stated he does not hold any position at all with the Union, nor is he a member of the Union.

Castillo stated that the camera which he used did not have any identifying marks on it. He further stated that on June 28 he did not wear any badge or sign which identified him as belonging to the Information Service Network. He testified that he did wear a "Union, Yes" hat while he was at the site, but does not remember which union representative gave him the hat. He only remembers that the hats were being passed out and he took one and wore it as he filmed. Castillo was the only person that used his equipment on June 28.

When asked how many employees were present when he identified himself, he stated that he attempted to interview two or three employees and each of these employees were accompanied by other employees for a total of about ten. Castillo did not know how many other employees passed by him as he filmed, but believes it was more than 20. When Castillo was unsuccessful in his attempts to secure an interview at the beginning of his taping, he stopped asking and waited until later to ask another employee for an interview. Castillo stated the camera was not running the whole hour and and [sic] a half that he was at the site. The camera remained on the tripod even when not in use. Castillo remembers a "couple" of employees asked him why they were being filmed and he told them it was for cable. The employees were in

addition to the employees which he attempted to interview. Castillo said he did not follow employees with the camera, nor did he photograph car license plates.

According to Castillo, he borrowed the camera which he used from a member of the community organization for which Morales had previously given an interview. Castillo stated that the Network does not own a camera of its own, but borrows from community groups. Castillo testified that Morales had not made arrangements for him to borrow the camera; Castillo made his own arrangements. He has borrowed this camera on other occasions.

Castillo stated that the Network is only scheduled to cablecast on Tuesdays and Thursdays. We further stated that the film would probably have been aired the next available Tuesday or Thursday. The earliest the film could have been shown was the Tuesday following the election.

Frank Velasquez, a unit employee, testified that he walks along Renfro Circle on the sidewalk on the same side of the street as the facility in order to go to the employee parking lot on 132nd Street. He also added that sometimes he crosses the street and walks along Renfro Circle opposite the facility, along the edge of the street because there is no sidewalk on this side of the street. According to Velasquez there is no barrier around the parking lot and he has seen other employees cross to the left side of Renfro Circle and enter the parking lot.

On June 28, 1990, as Velasquez left work shortly after 5:00 p.m., he used the sidewalk along Renfro Circle to arrive at the employees' parking lot. At the corner of Renfro Circle and 132nd Street he observed two UFCW Representatives and possibly 10 employees gathered on

the paved area at the corner. The two UFCW Representatives were Patrick O'Neill and Felipe Morales. Velasquez stated he walked up to the employees and joined them as they talked about the election to be held the next day. He stood there from 10 to 15 minutes. While there he saw a cameraman five to seven feet behind the group. The cameraman was standing with a tripod camera and, according to Velasquez, looked as if he was filming. The camera was facing the employees who were leaving the facility. Velasquez had not seen the cameraman before. Velasquez asked either O'Neill or Morales who the cameraman was and he was told the cameraman was from the Spanish channel on cable. Velasquez testified that there were approximately five to seven employees near enough to hear when he was told who the cameraman was. He stated in later testimony that not all of these employees overheard the identification of the cameraman. These employees, along with Velasquez, were all members of the plant organizing committee of the UFCW. Velasquez later testified that perhaps one or two employees were near enough to hear the cameraman being identified who were not members of the organizing team. Velasquez did not remember whether he was asked by any employee at a later date who the cameraman was. He stated he was possibly asked by his girlfriend the day after the election.

According to Velasquez he had asked O'Neill if there would be news crews out there the day before the election. He had asked if there would be news coverage because the employees planned to rally the day before the election on the corner and they had discussed their hopes of having news crews there. The employees had

seen coverage for another plant that had an election a few years earlier.

Velasquez did not remember whether or not Castillo was wearing a "Union, Yes" hat.

Patrick O'Neill testified that he is a General Organizer for Region 13 of the UFCW.[3] Beginning March 1990 he

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[3] Patrick O'Neill was called to testify by Counsel for the Employer when the hearing reconvened on the second day. Counsel for the Petitioner objected on the grounds that no notice had been given to the Petitioner that O'Neill was to be called as a witness. The Petitioner's Attorney further stated that the Employer had not subpoenaed O'Neill, and the Petitioner was planning to call him as its witness. At this time the Employer's Attorney asked to be allowed to call O'Neill on direct examination, and if it was not granted, he moved that all direct testimony be stricken. Attorney for the Employer also requested that I take an adverse inference from the fact if O'Neill did not testify for the Employer, but did so for the Petitioner. I asked Counsel for the Employer if he intended to subpoena O'Neill to which he stated that he did not. I then asked if he was not going to serve him with a subpoena, and could he do his questioning after he had been called as a witness for the Petitioner. Employer's Counsel asked that he be required to testify. I then made the ruling that O'Neill should be served with a subpoena and further stated that I had an extra subpoena with me. Counsel for the Employer stated that he was not going to serve him and again requested that O'Neill be required to testify or otherwise his testimony be stricken and that an adverse presumption be drawn from his refusal to testify. Counsel for the Petitioner stated that O'Neill was not refusing to testify, but he had not been subpoenaed. Counsel for the Employer renewed his request that O'Neill be required to testify and said he wanted to get it on record that he was refusing to do so. Again Counsel for Petitioner stated that O'Neill was not refusing to testify. After this discussion, I ruled that if the Employer's Counsel did not subpoena him, I would not require

was assigned full-time to the MPS campaign. Prior to this, he had been assigned to MPS off and on since October 1988. As coordinator of the MPS campaign, his duties included putting the campaign together, directing the work force of the other organizers, preparing and distributing leaflets to the employees, and the general running of the campaign. O'Neill also distributed "Union, Yes" hats to anyone who wanted one and wore one himself.

According to O'Neill, the duties of Felipe Morales consisted of basically working with the Spanish speaking

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him to testify at that time, adding that I did have extra subpoenas. In his Brief, Counsel for Employer renewed his motion that O'Neill's testimony be stricken from the record, citing *Security Services, Inc.*, 198 NLRB No. 174 (1972). After examining the above-cited case, I find that it is distinguishable from the instant matter in that the Charging Party discriminatee was not called by the General Counsel to testify, but instead his case was presented though the testimony of other witnesses. The Respondent attempted to call the Charging Party at the end of its presentation, after he had not been called by the General Counsel. In this matter, not only was O'Neill called to testify on behalf of the Petitioner, but was cross-examined by Counsel for Employer and recross-examined by Employer's Counsel. Also cited by Counsel for the Employer was *Hedison Manufacturing Co. v. NLRB*, F.2d, 106 LRRM 2897 (1st Cir. 1981) wherein the Employer's principal officer, was called by the General Counsel as its first witness. The Attorney for the Employer stated that he was not present and after being vague about when Hedison could appear, agreed to produce him the next morning, only to refuse to do so when the time came. Later in the hearing, the ALJ refused to accept him as a witness for the Employer. Unlike the circumstances in the instant matter, O'Neill was not only furnished as a witness, but Employer's Attorney was allowed to cross-examine him asking leading questions, which he stated was his intent in calling him as his own witness. Considering the above, Counsel for Employer's Motion to Strike is denied.

employees and trying to build coalitions with the Hispanic community. O'Neill stated that one of the activities planned during the campaign was a rally. He stated the rally fizzled out because the employees came out of the plant on a staggered basis which made it hard to put a rally together.

According to O'Neill, when the employees came to him with the idea of holding the rally, they asked for media coverage. O'Neill told Felipe Morales to call Castillo and see if he wanted to cover the rally for his news station. Castillo was not paid by the Union to come out. To O'Neill's knowledge, no one from the Union gave Castillo any directions or instructions concerning what to cover or what to film when he was there.

O'Neill was present as Castillo did his filming. O'Neill never saw a copy of the film that was taken by Castillo. He never asked to see a copy of the film, nor did any other union representative, to his knowledge, see or request a copy of the film.

Besides Channel 6, O'Neill contacted three other television stations and left a message informing them of the election at MPS on June 29th, along with his name and telephone number. None of the stations contacted O'Neill. O'Neill did not ask or encourage Castillo to engage in any campaign activity. O'Neill did not recall Castillo wearing a union hat while he filmed.

O'Neill testified that there was no formal organizing committee. He stated that there were strong Union supporters which included Velasquez, but there was no actual committee.

O'Neill thought that around five employees asked him about the cameraman. There were usually other employees walking past with co-workers as these questions were asked of O'Neill. O'Neill told the employees that the cameraman was from Cable Channel 6 or the Hispanic station. Employees who did not ask the identity of the cameraman were not told whom he represented.

O'Neill stated he did not operate the videocamera nor stand near it on June 28.

Analysis and Recommendations:

The issue to decide is twofold. First, is Castillo an agent of the Union, and if so, second, was his videotaping of employees objectionable conduct.[4]

Fernando Castillo testified that he is employed by the Information and Service Network, a local cable and production Company. The Network produces local programming for Cox Cable Channel 6.

According to Castillo he was made aware of the UFCW's organizational drive at MPS by organizer Felipe Morales. On an unspecified date, Morales called Castillo and advised him that a rally and handbilling were to be

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[4] I have considered the testimony of all witnesses, including those whose testimony I neither accept nor refer to. In evaluating the testimony of each witness I have relied upon his or her demeanor, and have also taken into account inconsistencies, conflicting evidence and have made my findings accordingly. My failure to detail each of these is not to be deemed a failure on my part to have fully considered it.

conducted June 28, 1990 at the facility. Morales told Castillo that the best time to film the event was during the shift change.

Castillo rode to the site with Morales on the 28th and arrived approximately 3:30 p.m. and remained there about an hour and a half. Castillo set up his camcorder on a tripod in the general area where the Union's organizers were handbilling.

He took pictures of the plant, the parking lot, cars entering and leaving the lot, and employees both leaving and entering the plant.

Castillo's camera and equipment had no identifying marks. There was a UFCW banner on the fence behind the area where the organizers and Castillo stood. Castillo accepted and wore a "Union, Yes" hat while he was at the site.

Castillo identified himself to the two or three employees whom he attempted to interview as being from the Information and Service Network. These employees were accompanied by other employees for a total number of about ten who were told Castillo's identity and purpose. In later testimony he remembered that a couple of employees asked him why they were being filmed and he told them it was for cable.

Frank Velasquez stated that he asked either O'Neill or Morales who Castillo was and he was told that he was from the Spanish channel on cable. There were approximately five to seven employees who were members of

the organizing committee close enough to hear the identification, and perhaps one or two employees who were not members of the organizing team.

According to O'Neill, about five employees asked him the identity of Castillo and they were told he was from Cable Channel 6 or the Hispanic station.

The testimony also revealed that unless employees specifically asked, they were not told who Castillo was or whom he represented.

The Union does not buy the Network's products and, according to Castillo, he was not paid by the Union for the filming. He also stated that he was not told what to film or given any directions on filming at the site. He was told, however, by Morales that shift change was the best time for him to do his filming.

I credit Castillo's testimony that while he did not actually film license plates of vehicles, he did film the vehicles themselves and employees as they walked to and from work past the site where the leaflets were being distributed, while only attempting to interview two or three.

In *Season-All Industries*, 276 NLRB 1247, (1985) which cited an opinion of the Fifth Circuit in *NLRB v. Carroll Contracting & Ready-Mix*, 636 F.2d 111 (5th Cir. 1981), the Board quoted the Fifth Circuit decision which stated:

> "the Fifth Circuit does not restrict the per se rule of Milchem to parties but holds that even a non-party who disrupts the voting procedure or destroys the atmosphere necessary to the exercise of a free choice in an election, warrants the setting aside of the election."

The Board considered apparent authority in *Technodent Corporation d/b/a Dentech Corporation*, 294 NLRB 83, (1989), and stated:

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *NLRB v. Donkins' Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB No. 57 slip op. at 4 fn. 4 (Sept. 30, 1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Restatement 2d, *Agency* 27 (1958, Comment). Two conditions therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. Id. at 8.
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> On the other hand, ratification is defined as "the affirmance by a person of a prior act that did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Id. at 82. Section 83 defined "affirmance " as either (a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or (b) conduct by him justifiable only if there were such an election. Finally, Section 94 states that "[a]n affirmance of an or (b) conduct by him justifiable only if there were such an election. Finally, Section 94 states that "[a]n

affirmance of an unauthorized transaction can be inferred from a failure to repudiate it."

While I have no problem with the fact that Castillo was notified of the proposed rally and handbilling by the Union and even told when the best time would be to film, the actions of both the Union and Castillo went beyond merely a newsman filming an event.

Castillo was taken by Organizer Morales to and from the site known to employees as the location where the Union passed out leaflets and campaigned. He filmed employees for approximately 15 minutes. During the remainder of his time at the site, he either stood behind or near his camera. He wore a "Union, Yes" hat while at the site. There was a UFCW banner on the fence behind the area where they stood. Also there were at least two union organizers present the entire time Castillo was at the site.

Even though Castillo was identified to approximately 20 employees who were basically in small groups, there were between 250 and 275 employees who passed the site where Castillo had set up his camera.

While witnesses furnished by the Employer testified that they either ignored or walked by Castillo and the organizers without paying much attention or asking for an explanation for the filming, this in itself does not diminish the possibility of fear in the remaining employees, nor does it place the responsibility upon the individual employees to ask for an explanation for the filming of the Union's handbilling.

There were no identifying markings on either the camera or on Castillo to connect him with the Information Network. The only forms of identification of any kind at the site were the "Union, Yes" hats being worn by Castillo and both Organizers, and the UFCW banner on the fence.

The Board's decision in *Pepsi-Cola Bottling Co. of Los Angeles*, 289 NLRB No. 94 (1988), among other cases, was cited by Attorneys for both parties. The Employer's Counsel argues that no assurances were given employees as to the purpose of the videotaping. He further argues the right to a free and untrammeled choice of bargaining representative is not diminished by the fact that the campaign against the union or employer is conducted by, or in the name of, third-parties rather than the employer or union. Counsel for Petitioner argues that the Board erred in its decision in *Pepsi-Cola*, supra. She stated that the Union's conduct of videotaping would not reasonably tend to interfere with employee free choice in an election. She further states that in the instant matter it cannot reasonably be found to have created an atmosphere of fear and coercion among employees.

While in this matter as opposed to *Pepsi-Cola*, supra, wherein the objectionable conduct was directly attributable to union officials, two organizers were present as Castillo filmed while wearing a "Union, Yes" hat which one of them furnished. Under these circumstances, the Union not only condoned Castillo's actions, but contributed to them by furnishing him with the hat. Knowing the only identification present at the site were the UFCW banner and the "Union, Yes" hats, the Union implied to employees that Castillo was one of its members. It is

reasonable for employees to assume that Castillo was another organizer. Applying the doctrine of apparent authority, the evidence supports a finding that the Petitioner was responsible for Castillo's actions even in the absence of direct evidence that it initiated or actually authorized these actions.

Considering whether the videotaping itself was objectionable conduct, I also cite *Pepsi-Cola*. In the instant matter, Castillo was only identified to approximately 20 employees out of a work force of 250 to 275. Even though Castillo only filmed employees for 15 minutes, his presence at or the near the camera was in itself intimidating under the circumstances involved.

In view of the foregoing, I conclude that Castillo acted as an apparent agent of the Petitioner and I find the filming of employees to be intimidating and coercive and it would reasonably tend to interfere with employee free choice in the election. Accordingly, I recommend that Objections 1 and 2 should be sustained.

Objection No. 3

> Within the last three (3) weeks prior to the election, the UFCW, acting through its agents and representatives, threatened with physical violence supporters of the Employer if they supported the Employer in the Election. By such threats of physical violence, the UFCW intimidated employees and created a general atmosphere of fear and reprisal rendering a free and fair election impossible.

Unit employees Arthur Harden, Jr., Dick Rasmussen, Russell Wills testified for the Employer. Alleged threats

to each of these employees were included in this objection. Patrick O'Neill testified for the Petitioner.

Arthur Harden, Jr. stated during direct examination that he discussed the Union's campaign with several employees, all of whose names he did not know. During these conversations he was asked to help in the campaign by holding up signs and by helping sign up employees. Frank Velasquez is the employee who asked Harden to obtain signatures. These conversations took place in the cafeteria during either break or lunch and in the hallway. During conversations with employee Linda Miller, Harden was asked to get involved. Harden responded that he was not for the Union, nor against it, and he did not want to get involved in it. According to Harden, about two to three days after he had talked with individuals concerning the Union, he experienced two flat tires while at work.

At this time, Harden testified that he was familiar with Patrick O'Neill and he had a couple of conversations with O'Neill. These conversations were one on one with no one else present, approximately one week before the election.

The first conversation took place when O'Neill introduced himself to Harden and stated that he was passing out literature. O'Neill asked Harden what he thought of the Union. Harden responded that he was not for it and he would be glad to read the literature and listen because he was always interested.

During the second conversation O'Neill asked Harden how it was going, according to Harden's testimony. O'Neill handed Harden a paper and said he had

heard that the employees had watched a film that day. Harden told O'Neill that the film was about the union and the violence and what occurs during a union election, how voting was conducted, and things like that. O'Neill then asked Harden how he felt about it. Harden stated the movie was pretty violent. They discussed the violence of the movie when O'Neill said, you know, violence could happen anywhere. Harden, upon being questioned concerning this statement, responded that O'Neill said it could happen in any plant and even MPS's plant. Harden said O'Neill stated it could happen at any plant there is, because that is what the movie was about.

Upon cross-examination by the Attorney for Petitioner, Harden described the movie in further detail by stating that the movies showed violence during a strike such as car windows getting broken, shootings, and people getting hurt and beaten. When asked by Petitioner's Attorney if O'Neill made the statement that he did not expect violence would happen at MPS or that there would be a strike at MPS and that most disputes, labor disputes, were settled without strikes and without violence, Harden stated he believed O'Neill said that. He also added that O'Neill said if things were settled without a strike going on, there probably would not be violence, but O'Neill said that it could happen anywhere, including MPS. Upon being shown his sworn affidavit which he had furnished to an NLRB Board Agent, Harden remembered that O'Neill said the things that happened on the film could happen to any plant/or could happen here.

Patrick O'Neill testified that he had introduced himself to Harden and Harden had asked him questions as

O'Neill handbilled. O'Neill affirmed that during a conversation with Harden he asked how Harden felt about the film which the Employer had shown. According to O'Neill, Harden said there was a lot of violence in the film and he told Harden that was the idea of the film. O'Neill further told Harden that it was the company's scare tactic to try to make employees think that if the Union was brought in there would be a strike there and if there was, in fact, a strike, it would be a violent strike. O'Neill testified that he told Harden to look at his fellow employees and asked him if he thought they were going to get violent with him. O'Neill told Harden that 98% of all contracts are settled without strikes and they did not anticipate a strike at MPS.

Analysis and Recommendation:

According to Harden, he experienced two flat tires while at work two or three days after strong union supporters asked him to help in the campaign.

In view of the foregoing, I conclude no evidence, nor witnesses were presented during the testimony, to link these employees directly to the incident involving the flat tires. Accordingly, I recommend that this part of the objection which concerns Harden's tires, be overruled.

Considering both versions of the conversation between Harden and O'Neill, I credit O'Neill.

Harden admitted upon cross-examination that O'Neill had stated he did not expect any violence at the facility and that most disputes were settled without violence. Harden further stated that O'Neill said if things

could be settled without a strike there would be no violence and the things that happened on the film could happen to any plant or could happen here.

O'Neill was merely stating the possibilities of what could occur if a contract was not negotiated.

Even assuming that Harden should be credited, I do not find Harden's account of the conversation to be coercive in nature or find evidence of any threats being made, real or implied.

In view of the foregoing, I conclude that the statements attributed to O'Neill did not interfere with the employees' freedom of choice in the election. accordingly, I recommend that this part of the Objection which concerns the conversation between O'Neill and Harden in which the film on strikes was discussed be overruled.

Dick Rasmussen testified that he received a telephone call the night of July 27. He later corrected the date to June 27. During this telephone conversation, a man identified himself as Patrick O'Neill of the UFCW. The caller then told Rasmussen when he went to vote on Friday, remember to vote the right way. Rasmussen replied to the caller that he would vote the right way. That ended the conversation.

Analysis and Recommendation

I have considered the testimony of Rasmussen. No evidence was presented that Rasmussen recognized the caller's voice as that of O'Neill. Even assuming that O'Neill did in fact call Rasmussen, I find nothing threatening nor coercive in the statement, "when you go to vote

on Friday, remember to vote the right way." This statement merely appears to be a request for support.

In view of the foregoing, I conclude that the telephone call attributed to O'Neill did not interfere with the employees' freedom of choice in the election. Accordingly, I recommend that this part of Objection 3 concerning the telephone call Rasmussen received on June 27, 1990, did not interfere with the employees' freedom of choice in the election and it should be overruled.

Russell Wills believes that about three weeks before the June 29 election he had a conversation with employee Ron Pierce in the cafeteria in which he told Pierce that he did not agree with some of the things concerning the election. During a second conversation, Pierce allegedly told Wills that he and Eldon Ingram, Wills' supervisor, were "white man niggers" and that they would sell their own people to anybody if they were over in Africa. Pierce then stated that Ingram and Wills would get theirs. During the conversation, three other employees were present in addition to Ingram and Wills. Prior to this conversation, by about an hour and forty-five minutes, Wills had seen Pierce outside in the parking lot. He observed Pierce in the car of Rayford Palmer, another MPS employee. The two employees called to Wills, but he did not answer. Upon examination by the Counsel for the Regional Director, Wills stated that he knew that Rayford Palmer was a union officer, title unknown. According to Wills, he told Pierce that he did not think they really needed the Union. Wills also stated that occasionally he and Pierce went out drinking together.

Patrick O'Neill testified as coordinator of the MPS campaign, he put the campaign together, directed the work of the other organizers, and prepared and distributed leaflets to the employees. According to O'Neill, there was no organized in-plant organizing committee. O'Neill stated that there were strong union supporters, but never a committee. These supporters were never given any formal training in organizing, nor was any special meeting held just for these employees. Only open meetings were held between the Union and employees.

O'Neill further stated that employee Rayford Palmer, Jr. helped in trying to form a union and tried to get his co-workers to go along with the Union. Palmer was not part of any committee, but a strong union supporter. O'Neill did observe Palmer sitting in his car in the employees' parking lot several times talking with employees.

Palmer was named along with eight other employees on a leaflet which the Union distributed to employees. These employees were not identified on the leaflet, but merely had their names listed at the bottom. The leaflet was written by O'Neill.

Analysis and Recommendation:

During Wills' testimony he never stated that Pierce was delivering a message from Rayford Palmer, as Counsel for the Employer attempted to establish. An adverse inference could be drawn from the fact that neither Pierce nor Palmer were called by the Attorney for the Petitioner to testify during the hearing, but I find no reason to do so based upon Wills' own testimony.

According to Wills, he and Pierce spend time together socially outside of the facility.

During the second conversation in the cafeteria between Pierce and Wills before the election, the only testimony garnered from wills was that Pierce said he and Eldon Ingram were "white man niggers and would sell their people to anybody if they were over in Africa." Pierce was also quoted as saying that he would get Wills and Ingram.

There is no evidence to tie the second conversation between Wills and Pierce with the organizational drive of the Union. Ingram is a supervisor and therefore not an eligible voter. Intimidation of Ingram would gain the Union nothing. Also, I would note that the Employer did not furnish Ingram to testify in this matter to corroborate Wills' testimony, and the Petitioner did not furnish Pierce to contradict Wills' testimony.

Pierce is neither employed by the Union, nor a union officer. He was a very strong supporter. Based upon the vagueness of the alleged threat to Wills by Pierce, I would not find this to be coercive to the point of preventing employees from exercising their choice in the election.

In view of the foregoing, I conclude that statements made to Wills by Pierce did not interfere with the employees' freedom of choice in the election. Accordingly, I recommend that the portion of Objection 3 which concerns the conversation between Wills and Pierce be overruled. See *Service America Corporation*, 298 NLRB 102 (1990). Accordingly, I recommend that Objection 3 be overruled in its entirety.

Objection No. 6

> On or about June 28, 1990, the UFCW, through its agents and representatives, promised employees that it would sponsor a dinner and free alcoholic drinks for employees and their families if the Union won the election. By this and other conduct, the UFCW promised employees a benefit, interfered with the employees' free choice, and made a free and fair election impossible.

Kathleen Reddick, unit employee, stated that during a conversation with an employee by the name of Mike and his girlfriend named Tonda, as Reddick worked, the two asked her if she would go to a party. They told Reddick that the Union was going to hold a party after work at 6:00, she thought. Reddick said she did not remember where she was told the party was being held, but it was at a bar. According to Reddick, she was told by Mike and Tonda that they were going to have free beer, free pizza, and free pop. They also told her that the party would last an hour or so. Reddick told them she was not interested. Reddick later identified the two individuals as Mike Fraleigh and Tonda Bruckner. Reddick was uncertain if any other employee heard this conversation.

Janel Jacob, unit employee, stated that she overheard a conversation between two employees that there was a party with free beer and pizza.

Patrick O'Neill testified that a party was held by the Union at the Stockade Lounge after the vote count. The lounge is a bar and restaurant about eight blocks from the plant. O'Neill stated he called the lounge and made arrangements for the party, telling the manager the party

would be held whether the Union won or lost. O'Neill also told the lounge manager that he was expecting 20 to 25 people. This conversation was held three or four days before the election. Employees were informed of the party at the last union meeting which was held before the election. They were told that employees were free to tell co-workers or whoever they wanted, and he also informed employees the week of the election as he hand-billed on the corner of Renfro Circle and 132nd Street. O'Neill stated he told employees the party would be held after the vote count and at the lounge. According to O'Neill, he told employees that we will have a good time if we win the election and we will be crying in our beer is we lose. When O'Neill arrived at the party about 9:00 p.m. to 9:15 p.m., there were already a couple of employees there. The party lasted about two hours and there were between 20 to 25 employees present. Beer, pop, and appetizers were served. O'Neill paid the bill which amounted to $47.00 with a $5.00 tip for a total of $52.00.

Analysis and Recommendations:

Kathleen Reddick's testimony concerning the Union's Party the day of the election was vague at best. Reddick stated she was asked by two employees, who were also identified as strong union supporters during the hearing, if she would go to a party the Union was having. She testified that the party was to be held after work at 6:00 p.m. She also remembered being told they were going to have free beer, free pizza and free pop. The party was to last an hour and was to be held at a bar whose name she "could barely remember." In spite of Reddick's failed memory, it is important to note that the party was to be

held *after* work. Through testimony furnished by the Employer, first shift employees have ended their shifts by 6:00 a.m. and the second shift begins from 5:00 p.m. to 5:30 p.m. Even assuming that the party was held between 6:00 p.m. and 8:00 p.m., it would not have been an inducement to sway second shift votes due to the fact that the second shift employees could not participate. Further, according to the testimony, the Union only expected 20 to 25 employees to participate. According to O'Neill, whose testimony I credit, only 20 to 25 employees did not fact attend with the total bill for the party, including drinks, food and the tip, to be $52.00, a nominal amount and thus permissible under Board standards. See *Movsovitz & Son, Inc.*, 194 NLRB 444 (1971).

In view of the foregoing, I conclude that the party sponsored by the Union the day of the election was of nominal value and did not interfere with the employees' freedom of choice in the election. Accordingly, I recommend that Objection 6 be overruled.

RECOMMENDATIONS

Having made findings of fact and conclusions based on all the credible evidence presented during the hearing, the undersigned recommends that the Employer's withdrawal of Objection 5 be be [sic] approved, that Employer Objections 3 and 6 be overruled, and that Employer Objections 1 and 2 be sustained. Accordingly, it is further recommended that the election be set aside and a second election be directed.

Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, any party may, within

fourteen days of the date of the issuance of this report, file with the Board in Washington, D.C., eight copies of Exceptions to this Report, with supporting brief if desired. Any parties so filing must immediately serve a copy thereof on the other parties and on the Regional Director, Region 17, Mission, Kansas. As further provided in the he [sic] Regional Director's Decision, if no exceptions are filed thereto, the Board, upon expiration of the period for filing such exceptions will adopt the recommendations of the Hearing Officer or make other disposition of this matter.

Dated: September 14, 1990

/s/ Janice C. Clayton
Janice C. Clayton, Hearing Officer
National Labor Relations Board
Seventeenth Region
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Case 17-RC-10493

STATEMENT OF SERVICE

I here by certify that I have this date served copies of the foregoing Hearing Officer's Report and Recommendations on Objections on all parties listed below by causing said copies to be desposited [sic] in the United States mail, postage prepaid, regular mail except as shown, in addition to the original and seven copies mailed to the Executive Secretary, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570-0001 and hand-delivery of one copy to the Regional Director.

Dated: September 14, 1990

/s/ Janice C. Clayton
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Case 17-RC-10493

Statement of Service of Copies of Hearing Officer's Report and Recommendations on Objections.

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Page 2 of 2 pages.

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(2)

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No. 93-682

In the Supreme Court of the United States

OCTOBER TERM, 1993

MILLARD PROCESSING SERVICES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably concluded that the conduct of a cable television reporter in videotaping a union rally the day before a Board election did not, in the circumstances of this case, create an atmosphere of fear and coercion that precluded the employees from exercising a free choice in the election.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-682

MILLARD PROCESSING SERVICES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-15a) is reported at 2 F.3d 258. The decision and order of the National Labor Relations Board is reported at 308 N.L.R.B. 929. The underlying decision and certification of representative (Pet. App. 16a-25a) is reported at 304 N.L.R.B. 770.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on July 30, 1993. The petition for a writ of certiorari was filed on October 28, 1993. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a bacon processing facility in Omaha, Nebraska. On May 8, 1990, Local 271, United Food and Commercial Workers International Union (Union) filed a petition with the Board's regional office for a representation election in a unit consisting of petitioner's approximately 240 production, maintenance, and sanitation employees. Pet. App. 26a; Pet. 3 n.1. Petitioner and the Union thereafter entered into a stipulation, approved by the Board's Regional Director, to hold an election in the unit on June 29, 1990. Pet. App. 26a.

Patrick O'Neill, the Union's general organizer during the election campaign, contacted four television stations regarding the campaign. Pet. App. 17a. O'Neill also instructed Felipe Morales, a union representative, to contact Fernando Castillo, the assistant director of Information and Service Network (ISN). ISN is a local company that produces programming for one of those stations. Pet. App. 4a-5a.[1] Morales informed Castillo that the Union was planning to hold a rally outside petitioner's plant on June 28. After Castillo expressed interest in interviewing employees about the election, Morales advised him that the best time to do so was during the shift change, which occurred between 4:30 and 5:30

[1] Castillo previously had interviewed Morales during the production of a program for a community organization unrelated to the union. After that interview, Castillo asked Morales to keep him apprised of union events. Pet. App. 4a-5a, 18a.

p.m. Morales did not have further discussions with Castillo concerning the manner in which ISN would videotape the rally, and neither Castillo nor ISN had any commercial relationship with the Union. *Id.* at 5a, 18a, 19a.

On the day of the rally, Castillo rode with Morales to petitioner's facility. Castillo set up a videocamera (which he borrowed from a community organization) on a corner between the plant and the employee parking lot, about 20 feet from where Morales and O'Neill were distributing leaflets in front of a union banner. Pet. App. 4a, 5a, 18a. No markings on Castillo or his camera indicated his affiliation with ISN. Castillo did, however, wear one of the "Union, Yes" hats that O'Neill and Morales distributed at the rally.

As background material, Castillo filmed the plant, employees entering and exiting the plant and parking lot, and employees accepting or refusing leaflets. When Castillo approached several employees and identified himself as an ISN reporter, each declined to comment about the election. Pet. App. 5a, 19a. As a result, Castillo decided not to use any of his footage; instead, he taped over it without making any copies. *Id.* at 19a.

Castillo was present at petitioner's facility for about an hour and a half. Pet. App. 5a, 18a-19a. In addition to making his ISN affiliation known to employees he attempted to interview, Castillo also properly identified himself to other employees who asked him why he was filming. When employees asked O'Neill who Castillo was, O'Neill explained that Castillo worked for a cable television station. *Id.* at

5a, 19a. Castillo did not distribute any union material or campaign for the Union. *Id.* at 6a, 18a.

2. The following day, the Union won the election by a vote of 114 to 84, with ten challenged ballots. Pet. App. 6a. Petitioner filed objections to the election, including an allegation that Castillo was an agent of the Union, and that his conduct, in videotaping individuals who refused to accept union leaflets, had hindered a free and fair election. *Id.* at 6a, 29a-30a.

After an evidentiary hearing, the Board's hearing officer recommended that the Board set aside the election. Pet. App. 59a. The hearing officer noted that Castillo was transported to and from petitioner's plant by the Union; wore a "Union, Yes" hat while at the site; bore no markings indicating that he was connected to ISN; and conducted his filming in front of a union banner and in the presence of O'Neill and Morales. *Id.* at 47a, 48a. The hearing officer thus determined that "the Union implied to employees that Castillo was one of its members," and that, under the doctrine of apparent authority, Castillo was an agent of the Union. *Id.* at 48a-49a.[2] Applying the Board's standard for evaluating alleged misconduct of parties to elections,[3] the hearing officer concluded that

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[2] See Pet. App. 10a-11a ("To create apparent authority, the principal must either intend to cause the third party to believe that the agent is authorized to act for it, or should realize that its conduct is likely to create such a belief.").

[3] Where alleged misconduct, such as videotaping of employees engaged in campaign activity, is attributable to the union or to the employer, the Board will set aside the election if, in the circumstances presented, that "conduct reasonably tends to interfere with the employees' free and uncoerced choice." *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. 736, 736 (1988). Accord *Sunbelt Mfg., Inc.*, 308 N.L.R.B. 780, 780 n.3 (1992),

Castillo's videotaping warranted setting aside the election. *Ibid.*

The Board rejected the hearing officer's recommendation and certified the Union as the collective bargaining representative of the employees in the stipulated unit. Pet. App. 23a. The Board explained that petitioner had not carried its burden of showing that "the Union had acted in a way to cause reasonable employees to believe that Castillo was its agent." *Id.* at 22a. Specifically, the Board disagreed with the hearing officer that the absence of markings connecting Castillo to ISN, coupled with a hat bearing union insignia, provided a sufficient basis for finding that Castillo acted on apparent authority from the Union. *Id.* at 21a-22a. The Board observed that, if wearing a widely distributed item on which a generalized pro-union statement appears were sufficient to establish an agency relationship, then "anyone who wore an emblem of a party to an election might be deemed an agent of that party." *Id.* at 22a. For similar reasons, the Board found that Castillo's proximity to O'Neill, Morales, and the union banner did not tend to establish an agency relationship. *Ibid.* (noting that "when the identity of the putative agent was questioned, the principal made clear his separate identity"). The Board also pointed out that there was no evidence that petitioner's employees were aware that Morales had given Castillo a ride to and from the plant. *Ibid.*

Having concluded that Castillo was not the Union's agent, the Board assessed Castillo's activity under its

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enforced mem., 996 F.2d 305 (5th Cir. 1993); *Nu Skin Int'l, Inc.*, 307 N.L.R.B. 223, 224 (1992).

standard for evaluating alleged third-party misconduct.[4] The Board concluded that a new election was not warranted, particularly "since a legitimate explanation for the videotaping was offered to at least 20 employees who asked about it." *Id.* at 23a.[5]

When petitioner subsequently refused to bargain, the Union filed an unfair labor practice charge. The Board's General Counsel issued a complaint alleging that petitioner's refusal violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (5). See Pet. App. 7a. The Board, adopting the recommendation of an administrative law judge, ordered petitioner to bargain with the Union. *Millard Processing Servs., Inc.*, 308 N.L.R.B. 929 (1992).

3. The petitioner petitioned for review to the United States Court of Appeals for the Eighth Circuit and the Board applied for enforcement of its order.[6] The court of appeals denied the petition for review and enforced the Board's order. Pet. App. 4a. Noting that "[w]hether an individual was a union agent is a question of fact," *id.* at 10a, the court held that the Board's finding that Castillo did not possess apparent authority to act on the Union's behalf was

[4] Misconduct by a third party must "create[] a general atmosphere of fear and coercion rendering free choice impossible" in order to justify a new election. Pet. App. 22a; *Pepsi-Cola Bottling Co., supra.* Accord *Crown Coach Corp.*, 284 N.L.R.B. 1010, 1011 (1987); *Anchor Inns, Inc.*, 262 N.L.R.B. 1137, 1139 (1982); *Steak House Meat Co.*, 206 N.L.R.B. 28, 29 (1973).

[5] Board Member Raudabaugh dissented, essentially for the reasons stated by the hearing officer. Pet. App. 23a-25a.

[6] The union intervened in support of the Board's order. Pet App. 7a.

supported by substantial evidence. *Id.* at 9a-12a. The court observed that "even engaging in union campaign activity (which Castillo did not do) is insufficient by itself to clothe a person with apparent authority to act on behalf of the union." *Id.* at 11a-12a. The court also noted that both Castillo and O'Neill explained to all employees who inquired that Castillo worked for the media. *Id.* at 12a.

Further, the court of appeals agreed with the Board's conclusion that Castillo's videotaping, as third-party conduct, did not require a new election. Pet. App. 12a-14a. The court observed that the Union offered petitioner's employees a legitimate explanation for Castillo's activity. *Id.* at 13a. The court added that the Board's conclusion was buttressed by the Union's margin of victory, for "conduct during an election campaign must be evaluated in the light of the closeness of the election's outcome." *Id.* at 14a.[7]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner suggests that the court of appeals' decision conflicts with the decisions of two other circuits, as well as prior Board decisions, holding that "surveillance" of employees engaged in protected activity is "inherently inhibiting." Pet. 7-9 (citing

[7] Senior Judge Gibson dissented, arguing that Castillo appeared to employees to be a union representative and that, by filming employees accepting or declining its literature, the Union "created a coercive atmosphere that interfered with the employees' exercise of free choice." Pet. App. 15a.

NLRB v. *Computed Time Corp.*, 587 F.2d 790 (5th Cir. 1979), and *Belcher Towing Co.* v. *NLRB*, 726 F.2d 705 (11th Cir. 1984)). The decisions cited by petitioner, however, do not suggest such a flat rule. See *Belcher Towing Co.*, 726 F.2d at 708 (recognizing that surveillance is "not a per se violation"); *Computed Time Corp.*, 587 F.2d at 794 (finding the surveillance did not constitute a violation). Moreover, each decision cited by petitioner as indicative of a coercive environment turned on specific facts. See *Belcher Towing Co.*, 726 F.2d at 707-709; *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. 736 (1988) (the conduct involved a union agent and the union offered no explanation for the conduct); *Mike Yurosek & Sons, Inc.*, 292 N.L.R.B. 1074 (1989) (same). See also *Nu Skin Int'l, Inc.*, 307 N.L.R.B. 223, 224 (1992) (finding that union photography of employees voluntarily attending a union-sponsored picnic had no reasonable tendency to coerce employees, and distinguishing *Pepsi-Cola* and *Mike Yurosek* on the ground that in those cases the unions had offered the employees no valid explanation for their actions); Pet. App. 13a, 22a.

2. Petitioner contends that, in upholding the Board's finding respecting Castillo's status as a union agent, the court of appeals did not "appropriately consider the importance of [the] employees' reasonable belief as to whether [Castillo] was authorized to act on the Union's behalf." Pet. 10. The court of appeals, however, correctly concluded that "[a]pparent authority results from a manifestation by a principal to a third party that reasonably leads a third party to believe that another person is acting as the principal's agent." Pet. App. 10a. Applying that standard, the court concluded that, in the circum-

stances presented, substantial evidence supported the Board's finding that Castillo was not an agent of the Union.[8] That fact-bound conclusion raises no issue warranting review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[9]

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[8] See Pet. App. 11a-12a; *id.* at 9a ("substantial evidence standard" applies to Board's factual findings "even in those cases in which the Board * * * reverses the decision of the hearing officer"). The Board found that Castillo's mere presence and proximity to the campaign activities did not suggest an agency relationship, especially since both O'Neill and Castillo explained Castillo's independent status to all employees who inquired.

[9] Petitioner also contends that the Board's decision "reflects a double-standard in union management relations" because in "analogous situations" the Board has inferred apparent authority "when an employer acts with the cooperation or in the presence of supervisors." Pet. 10-11. However, in the cases cited by petitioner, see Pet. 11, the Board found that the employer's entire course of conduct led the employees to reasonably believe that anti-union employees were acting on behalf of management. See *Advanced Mining Group*, 260 N.L.R.B. 486, 486 n.3 (1982), enforced mem., 112 L.R.R.M. (BNA) 2793 (D.C. Cir. 1983) (noting that the employer asked employees to join the anti-union group, permitted its members to solicit employees during worktime, and allowed group members to prepare anti-union literature on company time and equipment); *Wm. Chalson & Co.*, 252 N.L.R.B. 25, 33-34 (1980) (in finding that an employee acted with apparent authority from the employer in circulating a decertification petition, the Board noted that the employees reasonably viewed the fellow employee as an agent of management because he openly sought answers to their questions from a supervisor while telling them that it was against the law for the supervisor to discuss the decertification petition with them himself); *Hit 'N Run Food Stores*, 231 N.L.R.B. 660, 669 (1977) (finding that management "instructed [an employee] to get [fellow] employees to demand the return of their [authorization] cards by making clear to

3. Petitioner also asserts that the standard applied by the court of appeals to determine whether third-party conduct invalidates an election conflicts with decisions in other circuits. Pet. 12. After affirming the Board's finding that Castillo was not an agent of the Union, the court of appeals assessed the impact of his videotaping on the employees under the standard appropriate for third party conduct: whether the conduct "created 'an atmosphere of fear and reprisal such as to render a free expression of choice impossible.'" Pet. App. 12a.[10] The cases cited by petitioner as conflicting with this standard either state a similar standard,[11] or involved a different issue.[12]

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them that failure to do so meant the loss of their jobs [and] [t]he employees recognized that he was speaking for management"). Nor does *Haynes Indus., Inc.*, 232 N.L.R.B. 1092, 1099-1100 (1977), stand for the proposition that the Board infers apparent agency whenever the conduct occurs in the presence of union officials and is not disavowed or explained by them. There an anti-union petition was presented to employees for signature on company time in the presence of a company supervisor in circumstances that indicated company approval of the effort.

[10] Moreover, the court agreed with the Board that Castillo's videotaping, in the circumstances here, did not create an atmosphere of fear and reprisal. Thus, the court noted that both the Union and Castillo explained that Castillo worked for a television station to every employee who asked about his identity or whom Castillo attempted to interview, and that the record contains "no evidence of violence or threats or any other facts establishing a coercive atmosphere during the election campaign." Pet. App. 12a, 14a. Petitioner's challenge to that finding (Pet. 11-12) raises an evidentiary issue which does not warrant review by this Court. See *Universal Camera Corp.*, *supra*.

[11] See *NLRB* v. *Golden Age Beverage Co.*, 415 F.2d 26, 32 (5th Cir. 1969) (stating the test as "whether, in the circum-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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stances, the particular conduct complained of created an environment of tension or coercion such as to preclude employees from exercising a free choice").

[12] See *M & M Supermarkets, Inc.* v. *NLRB*, 818 F.2d 1567, 1573-1574 (11th Cir. 1987) (evaluating a third-party appeal to employees' racial or religious prejudices during the election campaign); *DID Building Servs., Inc.* v. *NLRB*, 915 F.2d 490, 497-500 (9th Cir. 1990) (same); *Universal Mfg. Corp.*, 156 N.L.R.B. 1459, 1466 (1966) (addressing impact on an election of newspaper articles that threaten plant closure or other economic consequences should unionization occur); *Hedstrom Co.*, 223 N.L.R.B. 1409 (1976) (same), enforced and remanded on other grounds, 558 F.2d 1137 (3d Cir. 1977).